

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	3
Argument.....	9
Conclusion.....	12

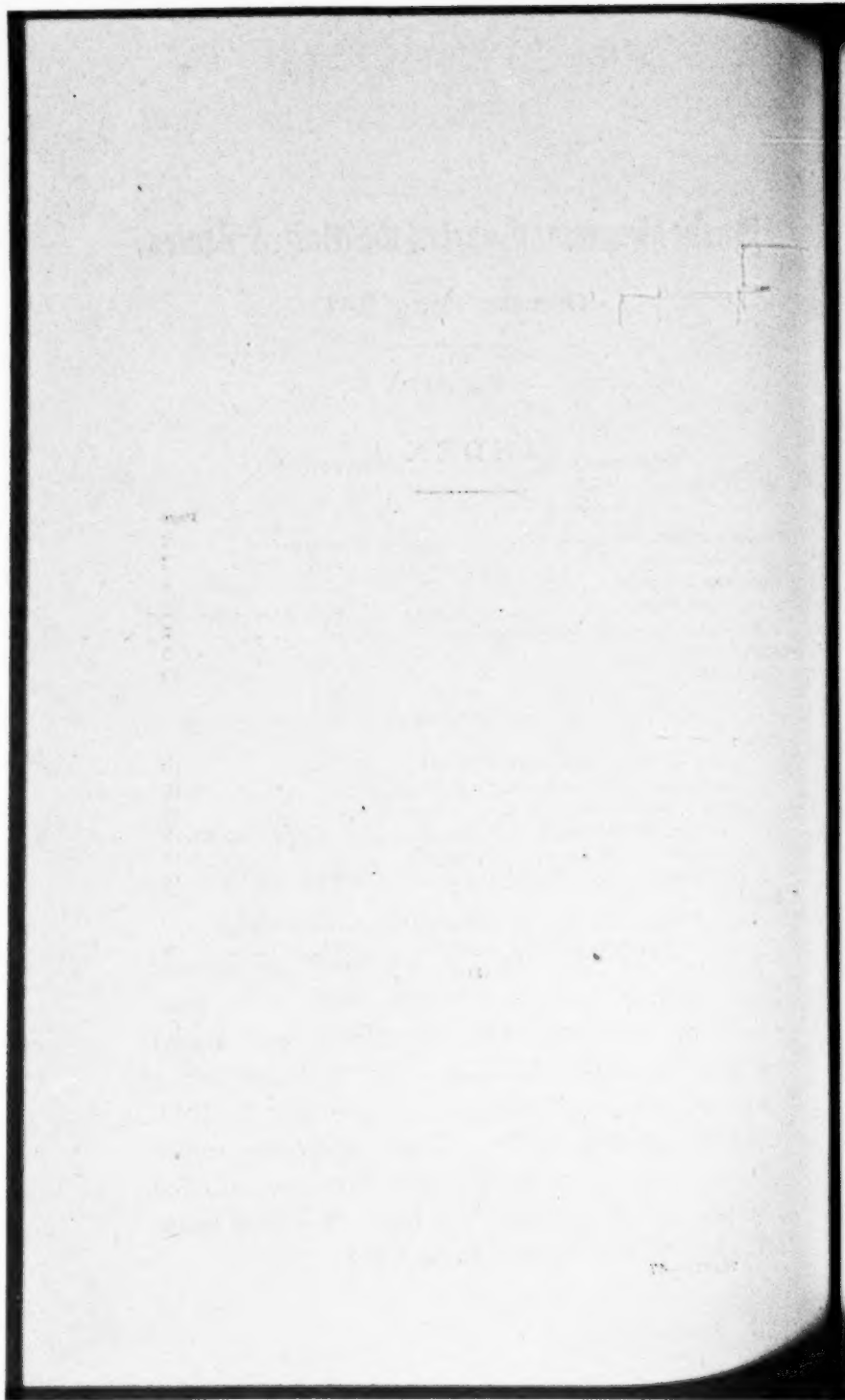
CITATIONS

Cases:

<i>Burns v. United States</i> , 287 U. S. 216.....	10
<i>Dillingham v. United States</i> , 76 F. 2d 35.....	10, 12
<i>Escoe v. Zerbst</i> , 295 U. S. 490.....	10
<i>Jianole v. United States</i> , 58 F. 2d 115.....	10, 12
<i>Pritchett v. United States</i> , 67 F. 2d 244.....	10
<i>United States ex rel. Grossberg v. Mulligan</i> , 48 F. 2d 93....	10

Statute:

Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by the Act of June 16, 1933, c. 97, 48 Stat. 256.....	2
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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 311

DONALD R. MANNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 272-276) is reported at 161 F. 2d 827.

JURISDICTION

The judgment of the circuit court of appeals was entered May 28, 1947 (R. 276), and a petition for rehearing (R. 278-278A) was denied August 2, 1947 (R. 279). The petition for a writ of certiorari was filed September 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim, P.

QUESTIONS PRESENTED

1. Whether petitioner was given a fair and proper hearing before his probation was revoked and he was sentenced to imprisonment.

2. Whether, in view of the evidence adduced at the revocation hearing, the trial judge abused his discretion in revoking petitioner's probation.

STATUTE INVOLVED

The Probation Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by the Act of June 16, 1933, c. 97, 48 Stat. 256, provides in pertinent part:

the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; * * *

* * * * *

SEC. 2. At any time within the probation period the probation officer may arrest the probationer wherever found, without a war-

rant, or the court which has granted the probation may issue a warrant for his arrest. * * * Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

On October 18, 1945, petitioner was convicted in the District Court for the Northern District of Alabama on his plea of guilty (R. 52-54) to an information charging eight separate violations of the Federal Food, Drug, and Cosmetic Act (R. 2-24), and he was sentenced to imprisonment for thirty days under count one and "placed on probation for the period of Three (3) Years under" counts 2-7 (R. 54-56).

As shown by the opinion of the court below (R. 274-275), since September 21, 1939, the District Court for the Northern District of Alabama has had a standing order imposing general conditions of probation requiring, *inter alia*, that a probationer must—

* * * 6. Conduct himself or herself honorably, work diligently at a lawful occupation and support his or her dependents, if any, to the best of his or her ability. 9. Not violate any law; local, state or national.

In addition, at the time of sentence, petitioner received a written notice which stated in part:

The general conditions of probation are as follows: (a) Refrain from the violation of any state and federal penal laws. (b) Live a clean, honest, and temperate life. * * * (R. 252, 275.)¹

On November 13, 1946, a complaint signed by the probation officer, stating that "he has information that subsequent to October 18, 1945, and before the present date, [petitioner] has violated the conditions of his probation," was filed in the district court (R. 261-262). The matter was called on November 15, 1946, at which time petitioner, by counsel, stated that he was not prepared to plead because he had not seen the charges, and moved the district court to require the Government to serve him with a formal complaint particularizing the charges against him (R. 57-58, 63-66). The district court denied the motion on the ground that no formal complaint was necessary (R. 67, 68), but required the United States Attorney to inform petitioner "of what the Government is complaining and give him the dates" (R. 69; see also R. 67). Thereupon, petitioner was informed by the United States Attorney that (R. 69-70)—

The Government contends that the subject, Donald R. Manning, has been prac-

¹ Cf. Pet. 2: "The record of judgment does not show that the petitioner was informed of any conditions of probation by the court."

ting medicine without a license in Bessemer, Alabama, during the period from May 1, 1946, to August 31, 1946.

* * * * *

The Government further charges that on or about May 9, 1946, the subject used the mails to defraud one Charles Edel, of Box 117, Cherokee, Alabama.

The Government further charges that on or about August 26, 1946, the subject used the mails to defraud one M. T. Hanson, of Repton, Alabama.

The Government further charges that on or about August 26, 1946, the subject used the mails to defraud Olin Harold, of Box 369, Bay Minette, Alabama.²

The matter was then adjourned for hearing until November 22, 1946 (R. 70; see also R. 67).

At the adjourned hearing, petitioner moved for a more particular specification of the acts and conduct charged against him (R. 71, 73). The motion was overruled (R. 71-72, 73), and an exhaustive hearing was held on the probation officer's charges at which petitioner himself testified and adduced testimony of other witnesses in defense (see R. 195, 207, 232, 248-249).

Briefly, the evidence offered by the Government showed that petitioner operated an establishment at Bessemer, Alabama, advertised as the "D. R.

² Written charges in substantially identical language were also served on petitioner some time prior to the hearing on November 22 (see text, *infra*). (R. 72, 262-264.)

Manning Herb House,"³ where he used steam baths and herbs in treating patients for various ailments, including asthma, rheumatism, high and low blood pressure, stomach trouble, backaches, lost manhood, nervous indigestion, gas, fallen womb, swelling, eczema, and inflammation of the ovaries (R. 180-181). Additionally, to support the charges that petitioner was both practicing medicine without a license and using the mails to defraud, as specified in the probation officer's statement of violations of probation, the Government showed that decoy letters (R. 78, 85-96, 110) such as the following from Olin Harold were sent to petitioner (R. 121; see also R. 128):

Have tried many preparations but none seem to eliminate the condition that plagues me. I haven't felt well for about 6 or 7 months. It's getting so I cannot retain anything on my stomach and am also losing weight pretty fast. Occasionally vomit up dark colored matter and feel a lump in my abdomen. A friend suggested I contact you as she knew a person who was fixed with the same trouble. Said you had stomach medicine so I am letting you know how I feel. If you got something that will fix me up please let me know at once as this troubles me a lot.

³ On one side of the entrance, the sign advertising the establishment had no period between the letters "D" and "R" (R. 181).

Petitioner replied to this letter as follows (R. 121-122; see also R. 128-129):

Received your letter today and as you explained to me it was a vomit and pus coming from the stomach. If this is the case, yes, I will put you in good health if you will take my advice in every respect. I am sending to you UL Powder and am asking that you follow directions. You are not to eat any kind food only sweet cow cream. This U. L. Powder will dry up the ulcer and the sweet cow cream will feed the body. Take 1 teaspoonful every $\frac{1}{2}$ hour and the next half-hour two ounces of sweet cow cream. Repeat this all day long until the box is empty. Stop eating all kinds of feed that causes gas on the stomach, such as pork meat, food fried in lard, turnip or collard greens, butter milk, and pop sodas. If you are in the habit of using any form of tobacco do not use it before meals always after meals.

Will appreciate if you will write to me in the next three or four days and tell me how you are doing. Do not eat self rising flour biscuits as there is an ingredient in it called sodium aluminum and this will cause gas and ulcerated stomach. This ingredient is contained in some baking powders; sodium aluminum is none other than powdered alum and this will cause ulcers on the stomach. Rumford baking powder is what I use in my home. It does not contain sodium aluminum. I am

sending to you a package c. o. d. \$1.00 (One Dollars) and when this package come please get it as the postmaster will charge 5¢ a day if not taken out at the proper time. Yours very truly, Manning Herb House. P. S. The next treatment will be \$3.00 (Three Dollars) each.

A medical witness testified that the symptoms described in the letter to petitioner were typical of stomach cancer, that an accurate diagnosis could not be made by correspondence, that the powder sent with petitioner's reply, which contained 99.6% chalk and .4% cinnamon (R. 111-112), would be absolutely worthless for cancer of the stomach, and that the diet of cream which petitioner prescribed would result in serious dietary deficiencies (R. 123-127; see also R. 128-135, 142-143).

At the conclusion of the hearing, the district court revoked petitioner's probation and sentenced him to imprisonment for one year and to pay a fine of \$750 (R. 253-254, 61-62). The judge orally explained his action as follows (R. 255-256):

* * * I think he is practicing medicine without a license, and I think he is making a diagnosis of ailments, and, as I said, preparing medicine and representing it will cure. In addition to that, he has signs advertising to Negroes and very ignorant people. I think he is holding him-

self out to them as a doctor, and he has these cards that make the guarantee that he will return the money. He is using a stethoscope, and I think under all the facts in this case he is practicing medicine. As I say, I think it is a fraud on the public which should not be tolerated. They were after him, according to records that have been furnished to me from the Probation Department, about practicing without a license in Georgia. Under his own statement, he was practicing in Georgia without a license, and he has come over here and is making a lot of money out of it. I am revoking his probation, first, on the theory he is practicing medicine without a license. Second, on the theory he is using the mails to defraud. And, third, on the theory he is not leading an honest life as required by the conditions of probation. In other words, I think he is in a dishonest business and I think it is a fraud on the general public and I think it should be punished. * * *

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment of the district court was affirmed (R. 276).

ARGUMENT

1. Petitioner contends that he was not given fair notice of the charges against him or a fair opportunity to defend (Pet. 9, 15-19).

This Court has stated that while an accused probationer must be given a hearing to enable him to explain away charges that he has violated his probation, nevertheless "this does not mean that he may insist upon a trial in any strict or formal sense" (*Escoe v. Zerbst*, 295 U. S. 490, 493), or that there are any "limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination" (*Burns v. United States*, 287 U. S. 216, 221). See also *Dillingham v. United States*, 76 F. 2d 35, 36 (C. C. A. 5); *Jianole v. United States*, 58 F. 2d 115, 117 (C. C. A. 8). Accordingly, the sole question in case of revocation of probation is whether there has been an abuse of discretion by the trial judge. *Burns v. United States*, *supra*, at 222; see also *United States ex rel. Grossberg v. Mulligan*, 48 F. 2d 93, 94 (C. C. A. 2); *Pritchett v. United States*, 67 F. 2d 244 (C. C. A. 4).

Judged by these standards, the proceedings in the district court are not open to attack. One week in advance of the hearing on the complaint of the probation officer, the court directed the Government to inform petitioner of the specific charges against him, and this was done, both orally and in writing. Although the statement of the charges was not as detailed as an indictment or information in specifying the elements of the violations of law alleged to have been committed by petitioner, still it gave him adequate

notice of the particular charges he must be prepared to meet. It is also clear that petitioner was given a fair hearing with fair opportunity to adduce whatever evidence he could to explain away the charges. He took the stand himself and, in addition, adduced evidence calculated to show that his conduct and activities were no different than those of the average pharmacist (R. 195-229) and that his reputation in the community was good (R. 248-249).

2. Nor can it be said that the trial judge abused his discretion in revoking petitioner's probation on the basis of the evidence adduced at the hearing. There is, as the court below stated (R. 275), abundant evidence in the record justifying the judge's conclusions that petitioner was illegally engaged in practicing medicine and that his activities were fraudulent. Petitioner's arguments that the evidence was insufficient to establish that his conduct constituted the illegal practice of medicine under Alabama law (Pet. 19-24) and that violations of the federal mail fraud statute were not proved because it was not shown beyond a reasonable doubt that he was not acting in good faith (Pet. 24-27), are unavailing. The criterion in a proceeding for revocation of probation, as in deciding in the first instance whether probation should be granted, is simply "whether the court is satisfied that its action will subserve the ends of

justice and the best interests of both the public and the defendant." *Burns v. United States*, *supra*, at 221. It is of no moment that the accused probationer has not been tried and convicted of another offense or even that it is not or cannot be proved beyond a reasonable doubt that he has committed a particular offense; it is enough that it sufficiently appears—as it does here—that the probationer has not conducted himself in accordance with his duty as a probationer. *Dillingham v. United States*, 76 F. 2d 35, 36 (C. C. A. 5); *Jianole v. United States*, 58 F. 2d 115, 117-118 (C. C. A. 8), and cases cited.

CONCLUSION

The judgment below is correct and the petition for a writ of certiorari presents no question warranting further review by this Court. We therefore respectfully submit that it should be denied.

✓ PHILIP B. PERLMAN,

Solicitor General.

T. VINCENT QUINN,

✓ *Assistant Attorney General.*

✓ ROBERT S. ERDAHL,

✓ SHELDON E. BERNSTEIN,

Attorneys.

OCTOBER 1947.